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Introduction

This brief is divided into two parts; the first part will correct misstatements of fact, the second will attempt to clarify legal holdings in order that the issues are not further clouded in this case.

MISSTATEMENTS OF FACT

This section of the brief will isolate those statements of the Brief in Opposition which are clearly erroneous so that this court will not be misled by fabrications. We will deal with errors in describing timing, the functions of family court, and irrelevance of statements, events, and cases.

Timing

On page 5, respondent states, "The father was unwilling to wait for the Family Court disposition and New York appellate procedures." On page 7, the respondent stated that, "The appeal could be joined with the mother's pending appeal to the Appellate Division." On page 9, the respondent lists a series of dates for the appeal in the Federal court to imply lengthy delay. Also, on pages 9 and 10, respondent attempts to explain away the failure to have transcripts as rendering any State appeal impossible.

The facts are:

1) Petitioner has taken every step possible to get those transcripts (and respondent cannot claim he did not). The transcripts were essential for any appeal since they contained the motions and events which constituted the constitutional attack. To this date, the transcripts have never appeared in spite of requests and orders to judge and court reporters. As to the difficulty of obtaining transcripts in forma pauperis, this matter should have been the subject of a fact-finding hearing at a habeas corpus (under 2254) where many attorneys familiar with Family Court would have testified as to the difficulty and often impossibility of obtaining such transcripts.

2) There is no pending appeal by the mother in the Appellate Division. The Notice of Appeal was filed by different counsel than that of petitioner and never followed up.

3) There was no matter of unwillingness to wait for Family Court dispositional hearing. As of January 2 of this year (the last court pronouncement), there was no "dispositional" decision ever made in spite of over 30 court appearances.[1]

4) As far as the speed and value of a Federal habeas corpus, if the habeas corpus had issued when brought on March 22, that would have been a considerable saving of time. The fact that an appeal has been necessary from the erroneous refusal to issue that immediate relief then, and that appeal has consumed eight or nine months, does not mean that remedy is slow but rather that the relief should have issued when requested, then and there.

5) In particular, it should be noted that respondent omits the fact that immediately after the denial of relief by the District Court,

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[1] Neglect trials are bifurcated. There is first a fact-finding then a dispositional the only order which can be appealed from. In many cases such as this, there are many "hearings" with placement of children before any "dispositional" hearing and order is had.

petitioner brought a motion for an immediate hearing by the Second Circuit Court of Appeals which motion was opposed by the respondent, in part, because of the claim that they were unfamiliar with the subject matter. The motion was denied. Subsequently, the briefs and appendix were filed in the statutory time limit and no extension of time was ever sought by petitioner. Petitioner did grant respondent an extension of time because of assurances that it would cause no delay in hearing argument. The Petition for Certiorari, of course, was filed also within the statutory limit.

Family Court

Respondent stated "It is scandalous to argue that the multi-part Family Court... will neglect its duty of considering afresh the contentions raised by the habeas corpus petition." (p. 7) He then contradicts himself, stating, "The primary consideration in a case involving neglect is the welfare of the child." (p. 10) One or the other of these statements must be false. Either Family Court will not

entertain these constitutional arguments which it had once rejected on the grounds that the primary consideration is the welfare of the child or it will consider them as basic. It is our contention that the second statement on page 10 reveals the true state of affairs and that the Family Court will not objectively examine the previously rejected attack on its constitutionality and procedure, but consider their past actions not only the law of the case but also again hold that their "primary" concern for the child renders constitutional and jurisdictional defects unimportant.

It should be noted that respondent states that Judge Polier has retired and therefore the case would not have gone back to her (p. 8). Judge Polier's last opinion in this case was on January 2, 1973. The Federal habeas corpus was brought on March 22, 1972 -- over nine months before her retirement on January 31, 1972. (See New York Law Journal, March 1, 1973, p. 1, column 7.)

Irrelevant Cases

Respondent states further that the Matter of Gary, 37 A.D. 2d 932, raised jurisdictional issues similar to those raised here and was handled expeditiously. There is no evidence of this in the reported decision or any reason in that record to lend any support to this contention. A glance can tell any reader that.

On page 12, respondent states that the Matter of Beaton, 30 NY_2 352 (1972) controls this case and that David Aleman in fact had counsel.[2] What is at stake in the present case is the inference to present neglect from a finding of past neglect where counsel was not present and parent not notified. The motion by counsel, when counsel was present, to re-open was denied and is one basis for habeas corpus.

Finally, respondent maintains that

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[2] Matter of Beaton was decided three months subsequent to the Federal habeas corpus denial.

"petitioner acknowledged on oral argument that his own decision...may have created delay." p. 8 This is a totally false statement of what was said and a misreading of the District Court decision. What petitioner had acknowledged was that he had failed to perfect, as did the state, the papers effectuating the remand from the Supreme Court to Family Court. It has been his contention always that this would be an act of futility. This acknowledgement and position were clear to <u>all</u> at District and Circuit Court level and should be clear in this court.

These misstatements of fact, although not critical to the legal argument might be distracting and we hope the truth is now clear. The essential point is this: the time-consuming referral back to Family Court which had rejected the claim denies due process and exhausts state remedies. There either should have been a hearing as

to the facts of delay and futility or the issuance of a habeas corpus to bring immediate relief.

MISSTATEMENTS OF LAW

The following section will attempt to clarify what the cases really held in this area to correct some misleading citations. We will select certain statements for clarification.

Futility of Pursuing Family Court Remand

"Similar conclusory contentions, that pursuit of state remedies would be in vain and that therefore federal habeas corpus should issue forthwith, have been advanced and rejected many times." Respondent's brief, p. 8.

Petitioner is not making purely "conclusory contentions" that pursuit of state remedies would be in vain. He is asking for a federal evidentiary hearing to determine whether, in fact, a state remedy which remands the identical issues of law and fact to the court which originally decided the case, for a collateral

hearing is an effective state remedy. In view of Lucas v. State of Michigan, 420 F.2d 259 (6th Cir., 1970), such a preliminary hearing appears to be mandated.

In addition, all petitions contain allegations concerning futility. How would respondent distinguish the petition in this instance from a petition alleging a Lucas unfavorable precedent? Who is to determine if the decision of the state court is on point or can be distinguished? Petitioner makes his allegations and then, at a subsequent hearing presents evidence on the point.

The cases cited by respondent in support of his claim all are radically different or irrelevant.

Cruysen v. Scudder, 215 F.2d 512 (9th Cir., 1954) is an outdated, pre-Fay v. Noia, 372 U.S. 391 (1963) case. Petitioner had appealed his conviction through the California state courts but had failed to petition for a writ of certiorari because

the warden had lost necessary papers. He then sought federal habeas corpus, alleging the futility to apply to state courts since they passed on the "exact questions which could be presented by a petition for the writ." The District Court required petitioner to file for state collateral relief anyway, not because the same issue futility theory was incorrect, but because, after the state courts had all rejected his claim, petitioner could "apply to the United States Supreme Court for a writ of certiorari and thus exhaust a remedy which he has failed to avail himself." The rationale, then, goes to a pre-Fay v. Noia exhaustion concept.

Dana v. Tracy, 360 F.2d 545 (1st Cir., 1966) is a peculiar case in which the facts make in inapposite. Petitioner was jailed because he could not make bail. Petitioner withdrew his state appeal so that his 30-day sentence would start to

run. He failed to pursue any state post-conviction relief. He filed his federal petition with six hours left on his sentence. Yet, the court ordered the District Court to retain jurisdiction while petitioner filed his state writ in order to keep the issue from mooting with expiration of sentence. Here there was no withdrawal but instead denial.

In U.S. ex rel Storch v. Maroney, 231 F. Supp. 385 (D.C. Pa., 1964) petitioner filed a writ before a state court. He then claimed sham and filed in the federal court. There was some doubt as to whether petitioner had pursued his available state remedy in good faith. Here there was complete pursuit and complete frustration.

Clear Futility Obviates Necessity of Pro Forma Exhaustion of State Court Remedies

"Mere anticipation of an adverse decision or the lack of probability of

success will not excuse a failure to exhaust state remedies." Respondent's brief, p. 8.

This conclusory rule would seem highly inconsistent with the Lucas line of cases. Petitioner's plight even appears to present an even greater certainty of adverse decision and futility.

The cases cited by respondent have no bearing:

In Boyd v. State of Oklahoma, 375 F.2d 481 (10th Cir., 1967) petitioner neither appealed nor sought state post-conviction relief. There "the state provides a suitable procedure for considering the issues herein presented but appellant has deliberately chosen to by-pass them and seek relief in the federal courts." This is hardly the case here. Petitioner has applied for state relief, and been permanently denied, but "no suitable procedure"

exists, so he reluctantly must seek a hearing in federal court. There is no state court procedure to pursue, so he must seek relief in federal courts.

U.S. ex rel. Touhy v. Ragen, 224 F.2d 611 (7th Cir., 1955) is completely off point. Petitioner failed to prosecute a writ or error to review his prosecution (possibly due to indigency or due to a contrary state decision directly on point); and also failed to prosecute a state habeas corpus attack (which remedy was no longer available to him due to the applicable limitation). The court held that he failed to exhaust his remedies in both respects. Today, Lucas would throw his failure to seek review into a new light; and Fay would over-rule the second failure to exhaust since state habeas corpus was no longer available.

Oliver v. State of California, 364 F.2d 311 (9th Cir., 1966) seems to be a case

where petitioner failed to seek state relief because of an adverse state decision directly on point. In addition, by the time of the court's decision, the federal courts had a Supreme Court ruling in agreement with that of the state and therefore petitioner had no case. In any case, the decision would seem out of step with Lucas.

Insupportable Delay as a Fact Necessitates Federal Intervention

"In any event, mere anticipation of delay in state habeas corpus or other post-decisional proceedings is not grounds for bypassing the state courts." Respondent's brief, p. 9.

The cases cited in Brief are not on point and, in fact, contain the seeds of the destruction of respondent's point.

Baldwin v. Lewis, 442 F.2d 29 (7th Cir., 1971) is a case where there was a one day lapse between the filing of the state and federal habeas corpus. The court did not purport "to determine here what period of time should be necessary" to

persuade a federal district court that inordinate delay existed (cf. Smith v. Kansas, 356 F.2d 654, and only held that the one day lapse was not such a delay.

In fact, the court held that "each case has to be judged on its own factual situation" and intimated that, in the case of a minor in original detention without bail, a very short time (two months or less) might represent such a delay (see p. 33). This would, in the case of a neglected child proceeding, militate for a factual hearing to evaluate the delay, past and expected, against the facts of a child in custodial care away from his parents.

Allen v. Leeke, 328 F. Supp. 292 (.D., S.C. 1971) also stated that "what might be 'inordinate delay' in one case might not be such in another. The particular circumstances of each case will determine whether the delay is excessive." at 295.

In addition, petitioner applied directly to the federal courts and experienced no state delay himself.

Missing Transcripts Render State Remedies Useless

"Counsel asserts that he ordered the transcripts. But his affidavit alleges nothing as to the follow-up steps he took to obtain them; nor does it delineate petitioner's need of them. This is insufficient. A party raising such an argument must factually show that he pursued all state avenues to secure the records and why they are necessary..." Respondent's brief, p. 10.

The cases cited here are not on point. Cruysen v. Scudder, supra, is misconstrued. It contains no language on the subject. Though the reason for petitioner's failure to petition the Supreme Court for certiorari was based on the fact that the papers he needed were lost (it's never clear if they were transcripts).

the case was decided on the basis of the now over-ruled pre-Fay doctrine of exhaustion of remedies.

Briggs v. Missouri, 321 F. Supp. 649 (D.C. Mo., 1971) and Johnson v. Middlebrooks, 383 F.2d 386 (5th Cir., 1967), have language similar to that of respondent's brief. However, they are based upon Wade v. Wilson, 396 U.S. 282 (1976), where the petitioner's sole claim in his habeas corpus petition was that the state's failure to provide him with free transcript for a habeas corpus petition violated due process and equal protection. The court didn't reach the issue because it felt petitioner could get the transcript through use of proper motion practice. This is hardly the case here. Petitioner is not on a fishing expedition. His petition presents specific constitutional challenges to the state decision. The denial of due process through failure to

provide a transcript for an unsupported habeas petition is not in issue. The transcripts missing here have been properly ordered and would be essential to a completion of a state appeal.

Appellee further suggests that there may be no need for transcripts on appeal (p. 10). This startling suggestion has long been discarded by the cases of Griffin v. Illinois, 351 U.S. 12 (1955); Hardy v. U.S., 375 U.S. 277 (1963); Coppedge v. U.S., 369 U.S. 378 (1961). Clearly, counsel needs the transcript of the denied motions, of the introduction of evidence of neglect being introduced from a hearing where the father was not present and unrepresented and the hearing where the first neglect adjudication

was made against the absent parent.

The Rights of a Family Unit Must Be Respected

"The primary consideration in a case involving neglect is the welfare of the child." Respondent's brief, p. 10.

The case cited for this startling claim, Matter of Desiree T, 64 Misc. 2d 28 (in a lower New York Court) is not at all on point with the issues of this case. That case derived the principal by citing and quoting Judge Dembitz in Matter of Blaine, 54 Misc. 2d 278. This case determined whether criminal rules of evidence would apply to admission of psychiatric evidence in neglect

dispositional hearings (by an analogy of neglect cases with delinquency determinations); or looser civil standards (by analogy to custody actions). The court decided that neglect proceedings were more closely akin to custody actions and applied more liberal standards. Therefore, the court was looking at purpose from an evidentiary rather than substantive view. It was not attempting to limit, or define, what the child's interest was, but only to draw analogies with either civil or criminal litigation in general for a specific and limited purpose.

Moreover, the basic point remains: the family is a fundamental unit. See petitioner's petition, page 17, and cases cited therein. We are all concerned for all children, but before the state can enter into and interfere with a family, it must proceed on adequate reasons and with due process. Lack of jurisdiction,

lack of counsel, lack of constitutional requirements, cannot be cured retroactively by the cliche of "best interest of the child."

CONCLUSION

For the reasons set forth above and in the petition filed herein, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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